

ENTERED

March 27, 2023

Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

MARK CLIFF SCHWARZER,

Plaintiff,

VS.

**DALE WAINWRIGHT, BRYAN
COLLIER, JENNIFER SMITH, LARRY
MILES, E. F. DEAYALA, MOLLY
FRANCIS, FAITH JOHNSON, SICHAN
SIV, ERIC NICHOLS, RODNEY
BURROW, BOBBY LUMPKIN,
LEONARD ECHESSA, ARICA D.
FLORES, O'DANIEL PATRICK and
DERRELYNN PERRYMAN,**

Defendants.

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Civil Case No. 6:18-CV-00034

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND
RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Pending before the Court is the January 17, 2023 Memorandum and Recommendation (“M&R”) prepared by Magistrate Judge Mitchel Neurock. (Dkt. No. 59). Magistrate Judge Neurock made findings and conclusions and recommended that Defendant’s Motion to Dismiss, (Dkt. No. 52), be granted in part and denied in part. (Dkt. No. 59 at 50–51). Magistrate Judge Neurock recommends that

- All of Plaintiff's claims against defendants Collier, Lumpkin, and Echessa in their official capacities for declaratory and injunctive relief should be dismissed without prejudice.
- Plaintiff's First Amendment claims against defendants O'Daniel, Perryman, Miles, DeAyala, Francis, Johnson, Siv, Nichols, Burrow, Collier, Lumpkin, and Echessa in their official capacities for declaratory and injunctive relief based on the 2018 denial of Plaintiff's mail should be dismissed without prejudice.

- To the extent that defendants O'Daniel, Perryman, Miles, DeAyala, Francis, Johnson, Siv, Nichols, and Burrow seek dismissal of Plaintiff's First Amendment claims against them in their official capacities for declaratory and injunctive relief based on the provisions of BP-03.91, that motion should be denied.
- Plaintiff's First Amendment claims against defendants O'Daniel, Perryman, Miles, DeAyala, Francis, Johnson, Siv, Nichols, Burrow, Collier, Lumpkin, Flores, Echessa, and Smith in their individual capacities for monetary relief should be dismissed with prejudice; and
- Plaintiff's procedural due process claims against defendants Echessa and Smith in their individual capacities for monetary relief should be dismissed with prejudice.

(*Id.*).

As a result of the above-mentioned recommendations, Magistrate Judge Neurock recommends that Plaintiff's First Amendment claim against defendants O'Daniel, Perryman, Miles, DeAyala, Francis, Johnson, Siv, Nichols, and Burrow in their official capacities for declaratory and injunctive relief based on the alleged unconstitutionality of BP-03.91 remain and proceed.

The Parties were provided proper notice and the opportunity to object to the M&R. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). On February, 6, 2023, Plaintiff filed an objection to Magistrate Judge Neurock's recommendation of dismissal of Plaintiff's First and Fourteenth Amendment claims against Defendants Echessa, Smith, and Flores. (Dkt. No. 60).

In accordance with 28 U.S.C. § 636(b)(1)(C), the Court is required to "make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings or recommendations to which objection [has been] made." After

conducting this de novo review, the Court may “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” *Id.*; *see also* Fed. R. Civ. P. 72(b)(3).

The Court has carefully considered de novo those portions of the M&R to which objection was made, and reviewed the remaining proposed findings, conclusions, and recommendations for plain error. Finding no error, the Court accepts the M&R and adopts it as the opinion of the Court. It is therefore ordered that:

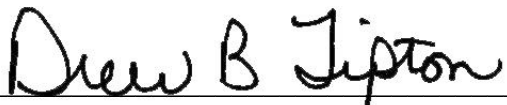
- (1) Magistrate Judge Mitchel Neurock’s M&R (Dkt. No. 59) is **ACCEPTED** and **ADOPTED** in its entirety as the holding of the Court; and
- (2) Defendants’ Motion to Dismiss, (Dkt. No. 52), is **GRANTED IN PART AND DENIED IN PART**.

Accordingly, the Court finds as follows:

- Plaintiff’s claims against defendants Collier, Lumpkin, and Echessa in their official capacities for declaratory and injunctive relief are **DISMISSED WITHOUT PREJUDICE**.
- Plaintiff’s First Amendment claims against defendants O’Daniel, Perryman, Miles, DeAyala, Francis, Johnson, Siv, Nichols, Burrow, Collier, Lumpkin, and Echessa in their official capacities for declaratory and injunctive relief based on the 2018 denial of Plaintiff’s mail are **DISMISSED WITHOUT PREJUDICE**.
- Plaintiff’s First Amendment claims against defendants O’Daniel, Perryman, Miles, DeAyala, Francis, Johnson, Siv, Nichols, Burrow, Collier, Lumpkin, Flores, Echessa, and Smith in their individual capacities for monetary relief are **DISMISSED WITH PREJUDICE**.
- Plaintiff’s procedural due process claims against defendants Echessa and Smith in their individual capacities for monetary relief are **DISMISSED WITH PREJUDICE**.
- Plaintiff’s First Amendment claims against O’Daniel, Perryman, Miles, DeAyala, Francis, Johnson, Siv, Nichols, and Burrow in their official capacities for declaratory and injunctive relief based on the provisions of BP-03.91 remain and proceed.

It is SO ORDERED.

Signed on March 27, 2023.



DREW B. TIPTON
UNITED STATES DISTRICT JUDGE